

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD BUSCH)	
Claimant)	
VS.)	
)	Docket No. 196,282
JOHNSON'S GENERAL STORES)	
Respondent)	
AND)	
)	
FARMLAND MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

By Memorandum Opinion filed September 18, 1998, the Court of Appeals remanded this proceeding to the Division of Workers Compensation to determine the amount of permanent partial general disability benefits that claimant is entitled to receive as a result of his February 28, 1994 accident.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award dated May 29, 1996, decided by Special Administrative Law Judge Michael T. Harris.

ISSUES

Before claimant's work-related accident in February 1994, he had undergone hiatal hernia repair surgery and a Nissen fundoplication, a procedure where the top portion of the stomach is wrapped around the esophagus to create a valve-like function that is intended to stop the reflux of acid up into the esophagus. The Court of Appeals determined that the February 1994 accident caused both a recurrent hiatal hernia and some damage to the Nissen fundoplication wrap and, therefore, found that claimant sustained a "non-scheduled" injury. The Court remanded this proceeding to the Division of Workers

Compensation to determine claimant's permanent partial general disability. That is the only issue now before the Board.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) Donald Busch worked for Johnson's General Stores, a convenience store chain, for over 20 years. On February 28, 1994, while lifting heavy equipment, Mr. Busch developed a recurrent hiatal hernia and damaged a Nissen fundoplication wrap, which had been surgically created in 1991. That accident arose out of and in the course of his employment.

(2) In July 1994, Jace W. Hyder, M.D., the surgeon who had earlier repaired Mr. Busch's hiatal hernia and performed the Nissen fundoplication procedure, again repaired the hiatal hernia and tightened the fundoplication wrap.

(3) As a result of the accidental injury, Mr. Busch must now observe the following medical restrictions that were placed upon him by Dr. Hyder:

. . . no lifting over 30 pounds, especially when climbing or stooping. No constant lifting over 30 pounds. No absolute lifting over 50 pounds.

(4) After recovering from the July 1994 surgery, Mr. Busch returned to work for Johnson's General Stores. Because of the difficulties Mr. Busch experienced while trying to work within his medical restrictions and limitations, in November 1994 Dr. Hyder recommended that he quit that job. The next month, Mr. Busch terminated his employment. The Appeals Board finds the job Mr. Busch returned to at Johnson's was not appropriate. Accordingly, Mr. Busch justifiably resigned his position.

(5) At the time of the regular hearing in January 1996, Mr. Busch was unemployed. Since leaving Johnson's employment at the end of December 1994, Mr. Busch had neither worked for any other employer nor looked for work. The Appeals Board finds Mr. Busch has failed to make a good faith effort to find appropriate employment.

(6) Dr. Hyder testified that Mr. Busch has between a 10 percent and 20 percent whole body functional impairment as the result of the hiatal hernia and Nissen fundoplication. But expert medical witnesses, R. Larry Beamer, M.D., and Gilbert S. Santoscoy, M.D., testified that there was no permanent impairment. Both Drs. Beamer and Santoscoy agreed that hernia repairs and Nissen fundoplication procedures become more difficult with each operation and that Mr. Busch should not perform heavy lifting.

(7) Considering the doctors' testimony, the Appeals Board finds that Mr. Busch has a 10 percent permanent partial functional impairment as a result of the February 1994 accident.

(8) Mr. Busch has lost the ability to perform 38 percent of the work tasks that he performed during the 15-year period before his February 1994 accident. That finding is based upon Dr. Hyder's opinions as he identified 8 of 21 former work tasks that Mr. Busch should no longer perform as a result of his permanent medical restrictions. Although it is generally preferable that individual work tasks be identified and compiled by someone with expertise in that area, the task list that was provided by Mr. Busch is acceptable in this instance as there was no evidence that the list failed to break down his former jobs into separate tasks.

(9) For purposes of computing this award, Mr. Busch's average weekly wage is \$646.15 per week for the period commencing the date of accident through the date he terminated his employment with Johnson's General Stores on December 31, 1994. At that time, the average weekly wage increases to \$728.44 due to the discontinued additional compensation items. Those numbers are provided in the exhibit introduced by Johnson's at the January 1996 regular hearing.

CONCLUSIONS OF LAW

(1) Because the Court of Appeals has found that Mr. Busch has sustained a "non-scheduled" injury, permanent partial general disability is determined by averaging the task loss with the percentage difference in pre- and post-injury wages.

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.¹

¹ K.S.A. 44-510e.

But that statute, however, must be read in light of Foulk² and Copeland³. In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage should be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(2) As indicated in the findings above, Mr. Busch has made no attempt to find appropriate employment since leaving Johnson's General Stores in late December 1994. Therefore, pursuant to Copeland, a post-injury wage must be imputed based upon Mr. Busch's post-injury ability to earn wages.

(3) The Copeland case was decided long after the parties had submitted their evidence to the Administrative Law Judge and even after the Appeals Board heard the appeal of the May 1996 Award. Therefore, the parties were not aware that Mr. Busch's ability to earn wages could be a relevant factor in computing his permanent partial general disability rating. In this instance, the Appeals Board finds that the proceeding should be remanded to the Director for the taking of additional evidence to determine Mr. Busch's post-injury ability to earn wages.

(4) Once the Director determines the appropriate post-injury wage that should be imputed to Mr. Busch, the percentage difference in pre-injury and the imputed post-injury wages should be averaged with the 38 percent task loss to determine the permanent partial general disability rating. The Director should then enter the appropriate award of benefits in light of the above findings.

AWARD

WHEREFORE, the Appeals Board remands this proceeding to the Director for the following purposes:

- (1) To take evidence of claimant's post-injury ability to earn wages;
- (2) To determine the percentage of difference between claimant's pre-injury and imputed post-injury wages;
- (3) To average the percentage of wage difference with the 38 percent task loss to determine claimant's permanent partial general disability rating; and
- (4) To enter any additional findings that might be required to enter an award of benefits in light of the findings and conclusions set forth above.

² Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

³ Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas M. Warner, Jr., Wichita, KS
Eric K. Kuhn, Wichita, KS
Randall C. Henry, Hutchinson, KS
Philip S. Harness, Director